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1 UNITED STATES DISTRICT COURT
2 SOUTHERN DISTRICT OF NEW YORK

3 UNITED STATES OF AMERICA,

4 v.

21 Cr. 636 (JPC)

5 RICARDO CRUCIANI,

6 Conference

7 Defendant.

8 -----x

9 New York, N.Y.
10 January 19, 2022
11 10:10 a.m.

12 Before:

13 HON. JOHN PETER CRONAN,

14 District Judge

15 APPEARANCES

16 DAMIAN WILLIAMS

17 United States Attorney for the
18 Southern District of New York

19 JANE KIM

20 Assistant United States Attorney

21 DAVID E. PATTON

22 Federal Defenders of New York, Inc.
23 Attorney for the Defendant

24 MARK GOMBINER

25 -and-

ELIZABETH EDWARDS MACEDONIO

MARK L. FURMAN

Attorney for Defendant

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1 (Case called)

2 MS. KIM: Good morning, your Honor. Jane Kim, for the
3 government.

4 THE COURT: Good morning, Ms. Kim.

5 MS. MACEDONIO: Good morning, your Honor. Elizabeth
6 Macedonio, Mark Furman, and Fred Sosinsky, for Mr. Cruciani.

7 Your Honor, I apologize, Mr. Sosinsky had a previously
8 scheduled telephone status conference. He should be in in
9 about two minutes.

10 THE COURT: Understood. Thank you, Ms. Macedonio. I
11 believe Mr. Gombiner -- and good morning, Mr. Gombiner -- may
12 have something at 10:30, which is why I wanted to get started
13 early.

14 MR. GOMBINER: Thank you, Judge. I was going to tell
15 the Court that. Thank you. Mark Gombiner, Federal Defenders.
16 I was asked to be here today.

17 THE COURT: Thank you for joining. And that's right,
18 I asked Mr. Gombiner to join.

19 The purpose of today's proceeding is to discuss
20 appointment of counsel. I understand Mr. Gombiner may be the
21 duty Federal Defender today.

22 By way of quick background, as the parties are, of
23 course, well aware, I received a letter on November 29 from
24 counsel for Mr. Cruciani seeking to be relieved as counsel and
25 have counsel appointed pursuant to the Criminal Justice Act.

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1 The letter indicated inability to continue to pay for retained
2 counsel.

3 I held a conference a couple of days -- a few days
4 after that at which I ordered a more detailed affidavit from
5 the defendant to discuss his eligibility, financial
6 eligibility, for appointed counsel. In particular, I ask that
7 the affidavit more clearly set out assets, liabilities,
8 transfer of funds, income. I received that affidavit. I
9 believe it was dated January 6 and -- yes, January 6. Counsel
10 asked that it be filed under seal and *ex parte*.

11 On January 13, the government opposed that request
12 citing some decisions in this circuit holding that applications
13 for appointment of counsel should be addressed in open
14 adversarial proceedings and that an application for appointment
15 of counsel should be treated as a judicial document subject to
16 the common law presumption of public access under the Second
17 Circuit decision in *Lugosch* and other cases like that.

18 I received a response from Mr. Cruciani's counsel
19 yesterday that largely relied on Judicial Conference guidelines
20 which provide that financial affidavits filed that seek
21 representation under the Criminal Justice Act should not be
22 included in the public file and should not be made available to
23 the public, whether via electronic access or at the courthouse.

24 So long way of saying there are two issues, and I
25 think the first one will be easier to deal with, and that's the

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1 appointment of counsel. I've reviewed the affidavit, and I
2 will appoint counsel pursuant to the Criminal Justice Act, and
3 I will appoint Mr. Gombiner as counsel.

4 Ms. Macedonio, I ask that you and your colleagues
5 provide to Mr. Gombiner any files in this case, although I'm
6 not sure if discovery has been produced yet, but in particular,
7 the financial affidavit that you provided me, since we'll turn
8 to that in a moment.

9 MS. MACEDONIO: Of course, your Honor, we will do
10 that.

11 THE COURT: So, Mr. Gombiner, what I was thinking --
12 and I want to get your thoughts on this, Ms. Kim's thoughts as
13 well -- I would keep the financial affidavit under seal and ex
14 parte for at least two weeks to allow you the opportunity to
15 address the issue and brief the issue. If after discussing
16 with your client that you will seek to continue to have the
17 affidavit sealed and not shared with the government, I do think
18 there are some issues that you would need to address, and those
19 are largely issues addressed by -- or raised, I should say, by
20 Ms. Kim in her letter. Maybe I'll just point them out quickly
21 now.

22 The first one is Judge Furman's decision in the recent
23 *Avenatti* case. In that decision he noted that the guidance of
24 the Judicial Conference, which I mentioned earlier, does not
25 provide a basis for the Court to seal financial affidavit,

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1 especially given the First Amendment's foundation of the
2 public's right to access.

3 There are also letters submitted by Ms. Macedonio and
4 her colleagues citing some out-of-circuit decisions which the
5 parties, obviously, should look at, but there have been some
6 Second Circuit decisions, *United States v. Harris* and *United*
7 *States v. Suarez*. I know *Harris* was cited by Ms. Kim; *Suarez*
8 may have been as well. I'm not positive about that. And
9 there's also a decision from Judge Sweet in *United*
10 *States v. Hilsen*.

11 You also might want to consider addressing part of the
12 CJA plan for this district. Section 6(e) precludes the ability
13 of the government to use information in a financial disclosure
14 affidavit in the government's direct case, other than a
15 prosecution for perjury or false statements. I mention that
16 because it would seem to indicate -- or at least it would seem
17 to contemplate an affidavit of that sort being shared with the
18 government.

19 So I apologize for going on for a bit. I wanted,
20 Mr. Gombiner, to flag those issues for you, see if you want to
21 take me up on the opportunity to brief it in two weeks, and
22 during that time, I will keep the materials under seal and *ex*
23 *parte*.

24 MR. GOMBINER: Judge, I just would say, though, I'm
25 kind of startled to hear that this is an issue. I've had many,

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1 many, many cases in magistrate's court where I've been
2 appointed as counsel, and we do not share the financial
3 affidavits with the government, and no one has ever suggested
4 otherwise.

5 So I'm not clear why this is so different, but I'll
6 address it further. But it does concern me, though. I think
7 that could have a chilling effect on people if they realize
8 that anything they put in a financial affidavit to obtain
9 counsel would have to be shared with the government and with
10 the public. I don't see -- I also don't see why the government
11 would need to know that.

12 THE COURT: Well, Mr. Gombiner --

13 MR. GOMBINER: So I'm just flagging that.

14 THE COURT: I will say this: My reaction was not
15 unlike yours. I was somewhat surprised to see the case law the
16 government pointed me to. I was not -- I am not aware of any
17 instances where financial affidavits are shared, if any, which
18 is why I want to give you the opportunity to --

19 MR. GOMBINER: OK. Thank you.

20 THE COURT: -- to address.

21 I also would say, in your submission you should also
22 think about whether there are redactions that could be made or
23 whether you may want to propose a more streamlined version of
24 the affidavit than the one that was submitted to me.

25 Two weeks from today, Mr. Gombiner, will bring you to

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1 February 2.

2 Ms. Kim, I'll give the government a week to respond to
3 anything from Mr. Gombiner, which would be February 9. Would
4 that work for you?

5 MS. KIM: Yes, your Honor.

6 THE COURT: So let me talk about discovery and where
7 we are; meaning, Ms. Kim, you want to take a moment to
8 summarize for Mr. Gombiner what discovery would look like in
9 this case and where things stand in terms of a protective
10 order, which I think you may still be discussing.

11 MS. KIM: Yes, your Honor. And just one additional
12 point on the financial affidavit.

13 I just want to make clear on the record that in
14 connection with the defense's November 29 submission, the
15 government actually has already received a copy of the
16 financial affidavit, which was sent from the defense to the
17 Court and the government under seal. So just want to make sure
18 that everyone is aware of that.

19 THE COURT: I apologize to interrupt. You're
20 referring to the first affidavit?

21 MS. KIM: Yes.

22 THE COURT: Got it.

23 MS. KIM: Yes. With respect to discovery, where we
24 are right now is that discovery has not yet been produced. We
25 will consult with Mr. Gombiner with respect to a protective

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1 order that we hope to send to the Court as soon as possible and
2 about the size of the terabyte hard drive and sort of the
3 formatting of some of the documents.

4 The discovery in this case includes search warrant
5 returns from the defendant's email accounts and subpoena
6 returns, as well as medical records of certain of the victims.
7 And so, as discussed last fall, the discovery is substantial in
8 this case, and so we will need a large hard drive from the
9 defense. But the government is prepared to produce that as
10 soon as we can get it copied.

11 THE COURT: This case has been going on for a little
12 bit of time now. I believe the arraignment was three months
13 ago. So I do want to make sure everything is moving in a
14 timely manner.

15 Mr. Gombiner, when would you propose coming back again
16 for a status conference?

17 MR. GOMBINER: Well, I mean, just speaking to previous
18 defense counsel, which is my basic knowledge of this case right
19 now, it sounds quite complex and seems like there are a lot of
20 moving parts. I mean, I would suggest coming back in 90 days,
21 because I don't think we're really going to be in a position to
22 do anything useful before that. So that's my suggestion.

23 THE COURT: Ms. Kim, 90 days, given the volume of
24 discovery, does that make sense to you?

25 MS. KIM: That's fine, your Honor. Thanks.

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1 THE COURT: Is discovery ready to be produced,
2 assuming you receive the hard drive and the protective order is
3 entered?

4 MS. KIM: Yes. It's really just a matter of copying
5 it onto the hard drive.

6 THE COURT: So if discovery is not produced within two
7 weeks, and hopefully it will be sooner than that, I'll ask that
8 you provide a status letter and let me know. I may have
9 another conference to make sure that that gets moving, but if I
10 don't hear from you, I'll assume it's been produced.

11 I know you're brand new to the case, Mr. Gombiner. Is
12 there anything further you wish to address this morning?

13 MR. GOMBINER: No. Nice to see you, Judge.

14 THE COURT: Same here.

15 And Ms. Kim?

16 MS. KIM: No, your Honor. Thank you.

17 THE COURT: So let's figure out a date in 90 days.

18 Ms. Kim, I think we have a conference in this case
19 scheduled for Friday. Do you agree we should adjourn that?

20 MS. KIM: Yes, your Honor.

21 THE COURT: Why don't we have our next status
22 conference April 19 at 9:30 a.m. Does that work for both of
23 you?

24 MR. GOMBINER: Yes, Judge.

25 MS. KIM: Yes, your Honor.

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1 MR. GOMBINER: That's fine.

2 THE COURT: Is there an application from the
3 government?

4 MS. KIM: Yes, your Honor. The government
5 respectfully requests that the Court exclude time from today
6 until the next conference on April 19. That time would allow
7 the parties to discuss a potential pretrial disposition and for
8 the government to produce discovery and the defense to review
9 it.

10 THE COURT: Mr. Gombiner?

11 MR. GOMBINER: Although I don't think those are good
12 reasons, we would consent to an exclusion based on the
13 complexity of the case. I think that's the appropriate speedy
14 trial exclusion.

15 THE COURT: Would you agree that includes the volume
16 of discovery?

17 MR. GOMBINER: Yes, yes, yes. So on that basis we
18 would agree. Thank you.

19 THE COURT: I will exclude time from today until
20 April 19, 2022, pursuant to Title 18, United States Code,
21 Section 3161(h)(7)(A). I find that the ends of justice and
22 thereby excluding such time outweigh the interests of the
23 public and the defendant in a speedy trial, and that is to
24 allow for the defense to receive and review discovery in this
25 matter, which I understand to be rather voluminous. It will

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1 also allow the parties to discuss a protective order and for
2 the government to provide it to the defense.

3 Are there any other matters we should address today?

4 MS. KIM: Not from the government, your Honor.

5 MR. GOMBINER: No, your Honor. Thank you.

6 THE COURT: Great. Well, thank you all.

7 Mr. Cruciani, I do see you. And thank you to your
8 attorneys as well for their service in this case.

9 I'll see everyone on -- not everyone. I'll see
10 Mr. Gombiner, Mr. Cruciani, and Ms. Kim on April 22.

11 (Adjourned)